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STATE OF ARIZONA
SUPERIOR COURT

2011 FEB 14 AM 10:47

JEANNIE H. H. CLERK

BY: Ivy Rios

5
6 IN THE SUPERIOR COURT

7 STATE OF ARIZONA, COUNTY OF YAVAPAI

8 STATE OF ARIZONA,

Cause no. V1300CR201080049

9 Plaintiff,

Div. PTB

10 vs.

11 JAMES ARTHUR RAY,

STATE'S RESPONSE TO
DEFENDANT'S MOTION TO INTRODUCE
IMPEACHMENT EVIDENCE RE: RICK
ROSS & FAWN FOSTER

12 Defendant.

13
14
15 The State of Arizona, by and through undersigned counsel, hereby objects to defendant's
16 motion to introduce impeachment evidence of the past felony conviction of Rick Ross and to
17 introduce impeachment evidence of several of the past felony convictions Fawn Foster. The motion
18 should be denied for the reasons set forth in the following Memorandum of Points and Authorities.

19
20 MEMORANDUM OF POINTS AND AUTHORITIES

21 A. Rick Ross

22 The issues pertaining to Mr. Ross have been addressed in the State's Motion *in Limine* re
23 Expert Rick Ross, and in the State's Reply to that motion. The State incorporates those pleading
24 herein by reference.

25 B. Fawn Foster

26 Ms. Foster has four prior felony convictions:

- On July 14, 1997, Fawn Lee Foster was convicted of Aggravated Driving Under the Influence, a class 4 felony, in Yavapai County Superior Court Cause No. CR9970176, date of offense was June 1, 1997.
- On February 8, 2006, Fawn Lee Foster was convicted of Possession of Marijuana, a class 6 felony, and Possession of Drug Paraphernalia, a class 6 felony, in Yavapai County Superior Court Cause No. CR820050156, date of offense was February 6, 2005.
- On November 13, 2006, Fawn Lee Foster was convicted of Possession of Drug Paraphernalia, a class 6 felony, in Yavapai County Superior Court Cause No. CR820060728, date of offense was October 9, 2006.

1. The 1997 Aggravated DUI Prior

Ms. Foster's 1997 felony conviction is over thirteen years old, and falls outside the ten year deadline created by Rule 609. Rule 609 provides that evidence of a conviction more than ten years old is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a **fair opportunity** to contest the use of such evidence. Here, as discussed in the aforementioned State's Reply, defendant's notice was provided to the State less than two weeks prior to the start of trial.¹ Defendant's failure to provide the State with the mandatory advance notice has prejudiced the State for primarily the same reasons as those discussed in the aforementioned State's Reply to Rick Ross motion.

Moreover, Rule 609(b) mandates that a felony conviction more than ten years old is not admissible unless the court determines in the interests of justice that the probative value of the conviction as supported by specific facts and circumstances, substantially outweighs its prejudicial effect. **Defendant's motion must be summarily denied because it failed to show any specific facts and circumstances** showing that in the interests of justice the probative value of the 1997 felony conviction outweighs its prejudicial effect.

Instead, defendant cited *State v. Williams*, 144 Ariz. 433 (1985), for the proposition that it need only come forward with the date, place, and nature of the prior felony conviction.

¹ The State alerted defendant to Ms. Foster's prior felony convictions in a 16 July 2010 letter to Truc Do, a copy of which is attached.

1 Defendant's reliance on *Williams* is misplaced. *Williams* did not discuss Rule 609**(b)**'s
2 requirements at all, nor did *Williams* even involve a factual situation where the prior felony
3 convictions that were more than ten years old. Instead, *Williams* was limited to determining when
4 a felony conviction met Rule 609**(a)**'s probative value requirement.

5 Defendant also argues that he has a right under the Confrontation Clause to impeach Ms.
6 Foster with her 1997 Aggravated DUI conviction. As discussed in the aforementioned State's
7 Reply, "[w]hile wide latitude is to be allowed in cross-examination, **the inquiry must be**
8 **relevant.**" *State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986) (emphasis added).
9 A prosecution witness may be cross-examined by the defendant to demonstrate possible **bias,**
10 **prejudice, or ulterior motives** of the witness. *Davis v. Alaska*, 415 U.S. 308, 320 (1974). "Bias"
11 is a catchall term describing attitudes, feelings, or emotions of a witness that might affect her
12 testimony, leading him to be more or less favorable to the position of a party for reasons other
13 than the merits. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 307 at 389
14 (2d ed. 1994). **Not everything tends to show bias, and courts may exclude evidence that is**
15 **only marginally useful for showing bias.** *Mueller & Kirkpatrick, supra*, § 268 at 188-89. The
16 **evidence must not be so attenuated as to be unconvincing** because then the evidence is
17 prejudicial. *Id.*

18 Regarding the nexus between Rule 609 and the Confrontation Clause, the Arizona
19 Supreme Court ruled that:
20

21 **The right of confrontation does not confer, however, a license to run at large**
22 **in cross-examination.** The right to cross-examination must be kept within
23 "reasonable" bounds and the trial court has discretion to curtail its scope. Distinctions between reasonable limitations on the scope of cross-examination and unnecessary restrictions on the right to confront witnesses are, however, difficult to draw and must be considered on a case-by-case basis. The test is whether the defendant has been denied the opportunity of presenting to the trier of fact information which bears either on the issues in the case or on the credibility of the witness. **As evidence of the witness' condition becomes more remote in time, it has proportionately less bearing on the credibility of the witness.**

24 *State v. Fleming*, 117 Ariz. 122, 125-126, 571 P.2d 268, 271-272 (*en banc* 1977)

1 (emphasis added); and see *State v. Henderson*, 116 Ariz. 310, 316, 569 P.2d 252, 258 (Ariz. Ct.
2 App. 1977) (“The determination as to whether or not a prior conviction can be used for
3 impeachment purposes calls for the exercise of discretion. The general guidelines ... include age,
4 character of the prior offense, the time of its commission, length of imprisonment, subsequent
5 conduct and intervening circumstances”).

6 The 1997 Aggravated DUI prior does not involve dishonesty or moral turpitude, was
7 punished by probation (with the requisite 4 month DOC sentence), and Ms. Foster did not commit
8 any further felonies until nearly eight years after the Aggravated DUI. Simply put, a thirteen year
9 old Aggravated DUI conviction is not probative of Ms. Foster’s credibility, motive, or bias, and is
10 properly precluded.

11 2. The February 2006 Possession of Marijuana & Drug Paraphernalia Convictions

12 In February 2006, Ms. Foster was convicted of Possession of Marijuana and Possession of
13 Drug Paraphernalia (felonies committed on the same occasion) after failing to complete a “TASC”
14 diversionary plea agreement. The plea agreement contained an avowal by defendant that she was
15 subject to the mandatory probation terms of A.R.S. 13-901.01. Paragraph four of the plea agreement
16 amended the charging document to conform to the plea agreement. The plea agreement was entered
17 and accepted by the court. Nine months after accepting the TASC plea offer, defendant pled guilty
18 to another drug felony (which was not subject to mandatory probation under A.R.S. §13-901.01, as
19 discussed below), and was sentenced to a concurrent one year term in DOC. When initially
20 sentenced, defendant was not eligible to be sentenced to prison. A.R.S. §13-901.01. Without
21 defendant’s later agreement to waive mandatory probation and be sentenced to a terminal,
22 concurrent prison term, she could not have been sentenced to prison for the February 2006 offenses.
23 *Id.*

24 The Arizona Supreme Court has ruled that a felony conviction for a drug offense that is
25 subject to A.R.S. §13-901.01 may not be used for impeachment purposes, since it does not satisfy
26 Rule 609’s definition of a felony offense, and does not otherwise constitute a crime involving

1 dishonesty or false statement. *State ex rel. Romley v. Martin*, 205 Ariz. 279, 69 P.3d 1000 (2003).
2 Because the law under which defendant was convicted in February 2006 did not permit her to be
3 imprisoned for a year or more, the February 2006 convictions may not be used to impeach Ms.
4 Foster.

5 Nor does the Confrontation Clause permit defendant to cross-examine Ms. Foster about the
6 February 2006 convictions. As noted above, “[t]he right of confrontation does not confer,
7 however, a license to run at large in cross-examination. The right to cross-examination must
8 be kept within “reasonable” bounds and the trial court has discretion to curtail its scope... The
9 test is whether the defendant has been denied the opportunity of presenting to the trier of fact
10 information which bears either on the issues in the case or on the credibility of the witness.” *State*
11 *v. Fleming*, 117 Ariz. 122, 125-126, 571 P.2d 268, 271-272 (*en banc* 1977) (emphasis added).

12 Moreover a trial judge retains wide latitude insofar as the Confrontation Clause is
13 concerned to impose reasonable limits on cross-examination based on concerns about, among
14 other things, interrogation that is **only marginally relevant**. *State v. Canez*, 202 Ariz. 133 at 153,
15 ¶ 62, 42 P.3d 564, 584 (2002), *supplemented*, 205 Ariz. 620, 74 P.3d 932 (2003).

16 A five year old conviction for a personal possession drug offense that is not punishable by
17 imprisonment does not bear on the witness’ credibility, and at best, is only marginally relevant to
18 Ms. Foster’s credibility, motive, or bias. This is particularly true because, as discussed below, the
19 defense may impeach Ms. Foster with her November 2006 Possession of Drug Paraphernalia
20 conviction, so the jury will know she had a serious drug problem in 2006.

21 3. The November 2006 Possession of Drug Paraphernalia Conviction

22 In November 2006, Ms. Foster was convicted of Possession of Drug Paraphernalia. The
23 plea agreement (which was accepted by the court) stipulated that this felony conviction was not
24 subject to the mandatory probation provisions of A.R.S. §13-901.01. As this felony conviction was
25 committed within the last five years, the State does not oppose defendant’s request to impeach Ms.
26 Foster with the November 2006 felony conviction.

1 C. Conclusion

2 Evidence of Mr. Ross' thirty-five year old felony conviction is not admissible for the
3 reasons discussed in the State's Motion in Limine re Expert Rick Ross, and in the State's Reply to
4 that motion. Ms. Foster's 1997 Aggravated DUI conviction is not admissible due to its age and lack
5 of probative value about her credibility. The 1997 Aggravated DUI conviction is also not admissible
6 because the defense failed to provide the State with sufficient advance notice, as required by Rule
7 609. The February 2006 convictions are not admissible as Ms. Foster was not subject to
8 imprisonment for this offense when she was sentenced in February 2006. *Martin*, 205 Ariz. 279.
9 Nor are the February 2006 convictions more than marginally relevant to Ms. Foster's credibility.

10 Accordingly, for all the foregoing reasons, the State respectfully requests the court deny
11 defendant's motion to impeach Mr. Ross with his thirty-five year old conviction, or Ms. Foster
12 with her 1997 conviction or her February 2006 convictions.

13 Respectfully submitted this 14th day of February, 2011.

14 By 

15 Bill R. Hughes

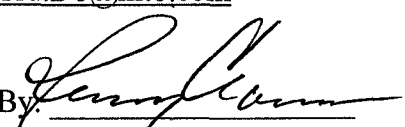
16 Deputy Yavapai County Attorney

17
18
19 COPIES of the foregoing emailed this
20 14th day of February, 2011:

21 Hon. Warren Darrow
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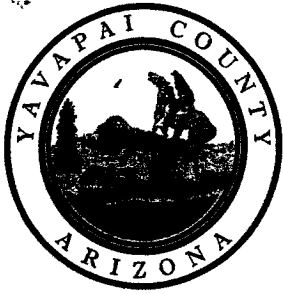
By: 

COPIES of the foregoing delivered this
14th day of February, 2011, to

Thomas Kelly
via courthouse mailbox

Truc Do
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By: 



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SHEILA POLK
Yavapai County Attorney

VIA EMAIL & US MAIL

July 16, 2010

Truc T. Do
Munger, Tolles & Olson L.L.P.
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Re: State v. James Arthur Ray, CR 201080049

Dear Ms. Do:

In response to your request for information relating to prior felony convictions of the State's witnesses, the State has currently run criminal history reports on fifty-four (54) of the State's witnesses. We did not run reports on law enforcement or medical personnel, nor were we able to run reports on witnesses who reside outside of the United States. In some cases, we lacked sufficient identifying information to run criminal history reports. To date only one witness has been identified as having prior felony convictions. Specific details are as follows:

Witness: Fawn Lee Foster

Prior Felony Convictions:

On July 14, 1997, Fawn Lee Foster was convicted of Aggravated Driving Under the Influence, a class 4 felony, in Yavapai County Superior Court Cause No. CR9970176, date of offense was June 1, 1997.

On February 8, 2006, Fawn Lee Foster was convicted of Possession of Marijuana, a class 6 felony, and Possession of Drug Paraphernalia, a class 6 felony, in Yavapai County Superior Court Cause No. CR820050156, date of offense was February 6, 2005.

On November 13, 2006, Fawn Lee Foster was convicted of Possession of Drug Paraphernalia, a class 6 felony, in Yavapai County Superior Court Cause No. CR820060728, date of offense was October 9, 2006.

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We will continue with our efforts to run criminal history reports on the remaining civilian witnesses and shall promptly disclose any additional information pursuant to Rule 15.1(d)(1).
Ariz. R. Crim. P.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sheila S. Polk". The signature is written in a cursive, flowing style.

Sheila Sullivan Polk
Yavapai County Attorney